Supreme Court, U.S.
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No. 02-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2002

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The principles of comity and federalism that underlie the longstanding exhaustion doctrine require that federal constitutional claims first be raised in state court. Exhaustion requires a state prisoner to fairly present his claim to the state's highest court, and fair presentation requires the prisoner to alert the state court that the claim is a federal one. *Duncan v. Henry*, 513 U.S. 364 (1995); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Are comity and federalism offended where, in deciding a fact-intensive fair presentation question, the court below strictly construes *Duncan* and *O'Sullivan* to require that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it," and holds that, by operation of Oregon's unique post-conviction statutes, the State of Oregon was given "a fair opportunity" to pass upon the habeas petitioner's federal constitutional claim?

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BRIEF IN OPPOSITION

Petitioner Baldwin ("the state") seeks a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit. The respondent ("Mr. Reese") opposes the issuance of a writ.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 282 F.3d 1184 (2002) and is attached to the Petition for Writ of Certiorari as Appendix A. The district court's opinion is not reported. It is attached to the Petition as Appendix B. The Findings and Recommendation, and the Amended Findings and Recommendation, of the Magistrate Judge appear in the state's Supplemental Appendix.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1). The state's petition was timely filed.

STATUTES AND OTHER PROVISIONS INVOLVED

Or. Rev. Stat. § 138.640 (1999) provides, in pertinent part:

> The order making final disposition of the [post-conviction] petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a final judgment for purposes of appellate review and for purposes of res judicata.

Or. Rev. Stat. § 138.660 (1999) provides, in pertinent part:

> In reviewing the [post-conviction] judgment of the circuit court...., the Court of Appeals...may summarily affirm...the judgment on appeal.... A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal.

Or. R. App. P. 9.20 provides, in pertinent part:

> (2) If the Supreme Court allows the petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

STATEMENT OF THE CASE

I. CONVICTION AND DIRECT APPEALS

In 1991, following a bench trial, Mr. Reese was convicted on two counts of first-degree kidnapping and one count of first-degree attempted sodomy. He was sentenced to a thirty-year determinate sentence as a dangerous offender on each kidnapping count, to be served concurrently with each other. He was also sentenced to a thirty-six-month sentence for attempted sodomy, to be served consecutively to the kidnapping sentences.

Mr. Reese appealed. In *State v. Reese*, 114 Or. App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for resentencing. The Court of Appeals held that the trial court should have indicated a

presumptive sentence, such that the entire thirty-year sentence would not necessarily have to be served because, once the presumptive sentence was served, Mr. Reese would become eligible for consideration for release to post-prison supervision. *Id.* at 560.

Mr. Reese was resentenced on March 4, 1993. Represented by the same attorney who had represented him at trial and at the first sentencing, he was resentenced to thirty years imprisonment as a dangerous offender on the kidnapping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Mr. Reese again appealed. In *State v. Reese*, 128 Or. App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for resentencing. It held that the "trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence," and it "failed to do so." *Id.* at 326.

Mr. Reese was resentenced on September 9, 1994. A different attorney was appointed to represent him at this proceeding. Mr. Reese objected to this new attorney and ultimately appeared *pro se* before the court. In this proceeding, the prosecutor dropped his request to sentence Mr. Reese as a dangerous offender. The court sentenced Mr. Reese to a guidelines departure sentence of 260 months on each of the kidnapping convictions, to be served concurrently with each other, along with a thirty-six-month consecutive sentence for the attempted sodomy conviction.

Mr. Reese appealed the second resentencing. His appointed appellate attorney filed a *Balfour* brief. A *Balfour* brief is the Oregon variant of an *Anders* brief.[1] A *Balfour* brief is filed when an appointed lawyer believes there are no issues of merit. Counsel prepares and signs a statement of facts and procedural history as Part A. Counsel then includes any issues that the appellant wishes to raise as Part B. This section is signed by the appellant.

Unlike the system described in *Anders*, the *Balfour* system does not require counsel to withdraw. Also unlike *Anders*, an Oregon appellate court presented with a *Balfour* brief does not engage in its own independent review of the entire record. *See State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991).

The Oregon Court of Appeals affirmed without opinion. *State v. Reese*, 134 Or. App. 629, 894 P.2d 1268 (1995). Mr. Reese's counsel did not seek review by the Oregon Supreme Court.

II. POST-CONVICTION REVIEW

Mr. Reese then filed a petition for post-conviction relief ("PCR"). The PCR trial court appointed new counsel for Mr. Reese. Counsel then filed an amended PCR petition raising the claim of ineffective assistance of appellate counsel, citing explicitly

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[1] *Anders v. California*, 386 U.S. 738 (1967).

to the Sixth and Fourteenth Amendments of the United States Constitution as well as to the Oregon Constitution.[2]

The PCR court denied the ineffective assistance of appellate counsel claim, citing only federal authority. In its Memorandum of Opinion, beneath the heading titled "Adequate Appellate Counsel," the court simply wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983)."[3]

Mr. Reese appealed. He was appointed still another counsel for the PCR appeal in the Oregon Court of Appeals. Mr. Reese's PCR appellate counsel filed a *Balfour* brief, just as Mr. Reese's direct appeal counsel had done. For the section of the brief presenting the claims counsel thought without merit, counsel inexplicably attached Mr. Reese's *pro se* PCR petition rather than the amended petition that had been prepared by an attorney. As a result, the *Balfour* brief did not explicitly cite to federal

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[2]Although Mr. Reese's *pro se* PCR petition also alleged ineffective assistance of appellate counsel, it did not refer to the Sixth and Fourteenth Amendments.

[3]Just above the court's decision on the appellate counsel claim was a separate heading entitled "Adequate Assistance of Counsel." Under that heading, the PCR court ruled, "Petitioner received adequate assistance of trial counsel," citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), the leading federal precedent establishing the standard for ineffective assistance of counsel under the Sixth Amendment, and also citing "*Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981)," an Oregon case analyzing ineffective assistance claims under both the federal and Oregon Constitutions. *See Krummacher*, 290 Or. 867, 627 P.2d at 458, 461.

authority for the ineffective assistance of appellate counsel claim, as the amended petition had done.

The state filed a motion for summary affirmance. The Oregon Court of Appeals granted the motion and summarily affirmed the PCR court's decision without a written opinion.

Mr. Reese then filed a petition for review in the Oregon Supreme Court. He again alleged ineffective assistance of appellate counsel:

> **Statement of reasons for reversal of Court of Appeals**
>
> The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.
>
> **Statement of Facts**
>
> ...Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

App. A at 7-8 n. 5.

The petition also raised the issue of ineffective assistance of trial counsel. It cited to the Sixth and Fourteenth Amendments of the United States Constitution in support, as follows:

> Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th, and 14th Amendment rights have been violated.

Id. at 8 n. 5.

The Oregon Supreme Court denied review.

III. FEDERAL HABEAS CORPUS

Mr. Reese again alleged his appellate counsel rendered ineffective assistance in his amended habeas corpus petition. The case was referred to a Magistrate Judge, who ruled Mr. Reese fairly presented his claim of ineffective assistance of appellate counsel and recommended granting relief on that claim.

The Magistrate Judge ruled that the Oregon *Balfour* system is unconstitutional. This Court then decided *Smith v. Robbins*, 528 U.S. 259 (2000). In response, the state moved the Magistrate Judge to reconsider her ruling. The Magistrate Judge reviewed further briefing from the parties and again ruled that the *Balfour* system is unconstitutional.

The state objected to the Findings and Recommendation of the Magistrate Judge. It challenged the Magistrate Judge's conclusions that the *Balfour* system is unconstitutional and that Mr. Reese had fairly presented his claim of ineffective assistance of appellate counsel to the Oregon Court of Appeals. The district court initially agreed with the Magistrate Judge, but ultimately overturned the Magistrate Judge's Recommendation due to the intervening November 13, 2000, decision of the

Ninth Circuit Court of Appeals in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). Mr. Reese moved unsuccessfully for reconsideration and then appealed to the Ninth Circuit Court of Appeals.

IV. THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit reversed the district court's decision. In a section entitled, "Scope of *Lyons*," it reaffirmed that *Lyons*'s "requirement of explicitly presenting a federal claim must be satisfied at the highest levels of the state court system to ensure that possibilities of the state courts resolving federal issues relating to state prisoners have been truly exhausted." App. A at 12. The court also acknowledged the dictates of *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999):

> To exhaust a claim in the state courts, a habeas petitioner must, in addition to complying with *Lyons*, present that claim to the state's highest court, even if that court has discretionary control over its docket.

Id. (citing *O'Sullivan*, 526 U.S. at 845).

The Ninth Circuit strictly construed *O'Sullivan*. It held:

> A request to a lower court alone is not sufficient to exhaust prospects of state court relief on a federal claim. To exhaust requires that the highest state court must be alerted to the specifically federal nature of the claim presented.

Id. The court explained the interplay between *O'Sullivan* and *Lyons*, holding "that a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it." *Id.*

The court, applying relevant Oregon law, then determined that the Oregon Court of Appeals had been fairly presented with Mr. Reese's federal ineffectiveness of appellate counsel claim. App. A at 14-15; *see* Or. Rev. Stat. §138.640 (1999); Or. R. App. P. 9.20(2). Citing this Court's decision in *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995), the court determined that Mr. Reese fairly presented the issue to the Court of Appeals:

> To summarize our views: Reese raised the ineffective assistance of appellate counsel claim and cited federal authority in his petition to the PCR court. The PCR court cited only federal law in deciding the issue, and under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United State Constitution." *Duncan*, 513 U.S. at 365-66, 115 S. Ct. 887.

Id. at 15.

The court then addressed the issue of fair presentation to the Oregon Supreme Court. App. A at 16-19. Once again adhering to the dictates of *Duncan*, the court held that Mr. Reese met its fair presentation requirement because the Oregon Supreme Court had a fair opportunity to pass on his claims. The court held:

> The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the state "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis in internal quotations omitted). *See also Lyons*, 232 F.3d at 668 ("to satisfy the exhaustion requirement of §2254, habeas petitioners must 'fairly presen[t]

> federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights.'"(quoting *Duncan*, 513 U.S. at 365, 115 S. Ct. 887)). Comity requires only that we do not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.

Id. at 18 (emphasis by court).

REASONS FOR DENYING THE PETITION

There are six reasons for denying the state's petition:

- The decision of the court below rests on its interpretation of Oregon appellate procedure rather than on a failure to adhere to this court's fair presentation requirement.
- The state mischaracterizes the Ninth Circuit's decision of the fair presentation issue. In this and all of its fair presentation decisions, the Ninth Circuit has strictly adhered to the requirements of *Duncan v. Henry* and *O'Sullivan v. Boerckel*.
- The Ninth Circuit's strict adherence to the fair presentation requirements of *Duncan* and *O'Sullivan* runs counter to granting certiorari review to correct any conflict among the circuits.
- There are other legal grounds for affirmance that demonstrate the decision below is correct regardless of how the Court resolves the question presented.

- The question presented was never raised in the district court and was therefore waived by the state.
- The court below honored the principles of comity and federalism in correctly deciding this case on the merits.

Federal habeas corpus law is based on respect for comity. *Cf. Coleman v. Thompson*, 501 U.S. 722 (1991). Accordingly, respect is due to state procedures governing the means by which the state's appellate courts consider post-conviction claims to have been presented to them.

The fair presentation requirements of *Duncan* and *O'Sullivan* stem from this respect for comity.

> The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §2254(b) and (c), reflects a policy of federal-state comity, "an accommodation of our federal system designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights."

Picard v. Connor, 404 U.S. 270, 275 (1971). In *O'Sullivan*, 526 U.S. at 848-49, this Court held that "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process."

The Ninth Circuit Court of Appeals held that the State of Oregon had been presented with one full opportunity in Mr. Reese's case. The Ninth Circuit showed the utmost respect for comity. The Ninth Circuit has consistently done so in all of its decisions applying the fair presentation requirements developed by this Court in *Duncan* and *O'Sullivan*.

Nevertheless, Oregon urges this Court to adopt a uniform federal standard in this case, a standard requiring an identical form of presentation in every state, even states like Oregon, whose courts, pursuant to rules of pleading and decision, consider the petitioner's federal claims adequately raised. Oregon's argument is against comity, because it fails to afford full respect for the states' decisions about how to structure their own rules of pleading and decision.[4] It would result in a trap for the unwary, because PCR petitioners could plead facts and law sufficient to raise a federal claim in the view of the state courts, only later to find that a federal court would hold that the state court was nof given an adequate opportunity.

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[4]Under *O'Sullivan*, 526 U.S. at 848-49, "state prisoners must give the state courts one full opportunity to resolve constitutional issues by *invoking one complete round of the state's established appellate review practice*" (emphasis added). In determining whether the opportunity requirement, and hence comity, has been fulfilled, the federal courts must refer to the individual "appellate review practices" of each state.

I. THE DECISION OF THE COURT BELOW RESTS ON ITS INTERPRETATION OF OREGON APPELLATE PROCEDURE RATHER THAN ON A FAILURE TO ADHERE TO THIS COURT'S FAIR PRESENTATION REQUIREMENT.

A. *The State Contended, in Its Rehearing Petition, That the Decision of the Court Below Rested on a Misunderstanding of State Appellate Procedure.*

The state devoted an entire section of its Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* to the contention reflected in its section heading, that "The Panel Decision Rests on the Misunderstanding of State Appellate Procedure."[5] The state argued, *inter alia*, that "the panel misunderstood a petitioner's role in the *Balfour* process, misapprehended Oregon's summary affirmance process, and failed to understand that appellate courts in Oregon cannot and do not consider claims not presented to them." App. 1 at 1.

The panel decision was based on a correct understanding of Oregon appellate procedure. However, whether the panel's application of Oregon appellate procedure was correct is beside the point. This Court should deny review, because the Court's interpretation of Oregon appellate procedure will only involve matters of Oregon law.

B. *In Its Petition for Writ of Certiorari, the State Fails to Disclose Key Features of Oregon Appellate Procedure Which Ensured That the Oregon Appellate Courts Were Presented with Mr. Reese's Federal Constitutional Issue.*

The court below recognized the unique statutory structure in Oregon which ensured that the Oregon appellate courts reviewed Mr. Reese's ineffective assistance of

[5]Section F of the state's rehearing petition is attached as Appendix 1.

appellate counsel claim as a federal constitutional claim. The court quoted the relevant statute, as follows:

> Oregon law requires the PCR court to "state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. §138.640 (1999).

App. A at 14.

Other language from the Oregon PCR statute is also relevant. The statute provides that the order, which must state clearly the grounds upon which the cause was determined, "shall constitute a final judgment for purposes of appellate review...." *Id.* This is important because the summary affirmance of a judgment, which occurred in Mr. Reese's case, is the summary affirmance of the PCR trial court's memorandum opinion.

The state's petition for writ of certiorari never mentions this provision of Oregon's PCR statutory scheme. The omission erroneously suggests that the Court of Appeals summarily affirmed the PCR court's judgment, without the benefit of its opinion. The state's suggestion is incorrect, however, not only because §138.640 says the PCR court's statement of the grounds for its decision shall constitute the judgment for purposes of appellate review, but also because the separate judgment of the PCR court specifically incorporated its memorandum of opinion. The Judgment stated:

> NOW, THEREFORE, IT IS HEREBY ADJUDGED that based on the Court's Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

Moreover, the state omits any reference to the Oregon statute which provides that a summary affirmance is a judgment on the merits. Or. Rev. Stat. §138.660. Thus, when the state claims that the Court of Appeals summarily affirmed the PCR trial court's judgment, it omits an important piece of Oregon law. Petition at 4. The state ignores the fact that the Oregon Court of Appeals affirmed the PCR court's memorandum opinion, which specifically addressed the federal constitutional issue.

The state also fails to disclose that the ruling by the Court of Appeals was a ruling on the merits. Section 138.660 specifically provides that "[a] dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal."

The state also omits from its certiorari petition the fact that the Oregon Court of Appeals had a duty to examine PCR constitutional determinations anew on appeal. This duty complements the PCR trial court's duty under Or. Rev. Stat. §138.640 to "state clearly the grounds upon which the cause was determined, and whether a state or federal question or both, was presented and decided." Consistent with §138.640, the Oregon Court of Appeals, in its own words, "examine[s] anew the [PCR] court's constitutional determinations." *Davis v. Armenakis*, 151 Or. App. 66, 70, 948 P.2d 327, 329 (1997).

Exposure of these omissions undermines the state's main criticism of the decision of the court below. This criticism contends:

> What the Ninth Circuit has done is to reject the requirement that state appellate courts be provided with an opportunity to consider a federal claim before it can be raised in federal habeas, and instead to require only that state courts have some ability to find the federal claim for themselves in the first instance.

Petition at 26-27.

The Ninth Circuit Court of Appeals did no such thing. Rather, it emphasized the requirement that state courts first be given the opportunity to hear federal habeas claims. App. A at 18-19. The Oregon PCR statutes required the PCR trial court to explicitly identify the grounds upon which it decided the case and to distinguish between the federal and state questions decided. Here, the PCR trial court did so. It clearly articulated its federal basis for deciding the ineffective assistance of appellate counsel claim against Mr. Reese in its memorandum opinion. That specific memorandum opinion was referenced in the judgment, and it was that very opinion and judgment which was affirmed by the Court of Appeals, an affirmance that constituted a ruling on the merits of the very same federal constitutional claim. Any contrary assertion belies the record and the Oregon PCR statutes.

II. THE STATE MISCHARACTERIZES THE NINTH CIRCUIT'S DECISION OF THE FAIR PRESENTATION ISSUE. IN THIS AND ALL OF ITS FAIR PRESENTATION DECISIONS, THE NINTH CIRCUIT HAS STRICTLY ADHERED TO THE REQUIREMENTS OF *DUNCAN v. HENRY* AND *O'SULLIVAN v. BOERCKEL*.

A. Since This Court's Decision in Duncan v. Henry, a Ninth Circuit Case, the Ninth Circuit Has Strictly Adhered to the Requirements of Duncan.

Duncan teaches that the fair presentation requirement earlier outlined by this Court in *Picard*, 404 U.S. at 275, means that state prisoners seeking vindication of federal rights in federal court must first have "alerted [state courts] to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-366. Henry, the petitioner below in *Duncan*, alleged in his habeas petition that he had been denied federal due process due to certain testimony at his state trial. On direct appeal, however, Henry had only complained of a "miscarriage of justice" under the California Constitution. The District Court granted the writ, finding that Henry had exhausted his state remedies, and the Ninth Circuit affirmed. *Id.* at 364-365; *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994). This Court reversed because Henry did not fairly present his due process claim to the California courts as required by *Picard* and by *Anderson v. Harless*, 459 U.S. 4 (1982). *Duncan*, 513 U.S. at 366.

Since this Court reversed the Ninth Circuit's judgment in *Duncan*, the Ninth Circuit has taken pains to comply with this Court's mandate. Following *Duncan*, the Ninth Circuit has made clear that fair presentation is not satisfied by the use of

conclusory words, even if those words are "due process." *See Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999) ("Neither is the exhaustion requirement satisfied by the mere circumstance that the 'due process ramifications' of an argument might be 'self-evident.'" (quoting *Anderson*, 459 U.S. at 7)); *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir.2000) ("Shumway's naked reference to 'due process' in Issue I was insufficient to state a federal claim"); *Lyons*, 232 F.3d 666; *Tamalini v. Stewart*, 249 F.3d 895 (9th Cir. 2001); *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir. 2003) (en banc). As the Ninth Circuit summarizes its post-*Duncan* jurisprudence,

> To "fairly present" his federal claim to the state courts, [the petitioner] had to alert the state courts to the fact that he was asserting a claim under the United States Constitution. *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). The mere similarity between a claim of state and federal error is insufficient to establish exhaustion. *See id.* at 366, 115 S.Ct. 887. Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion. *See Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996).

Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (per curiam).

Plainly and simply, the Ninth Circuit enforces *Duncan*'s fair presentation requirement in every case it hears.

B. Since O'Sullivan v. Boerckel, the Ninth Circuit Has Strictly Adhered to the Requirements of O'Sullivan.

In *O'Sullivan*, this Court detailed a requirement of fair presentation distinct from, but complementary to, that which it had reinforced in *Duncan*. *O'Sullivan* requires state

prisoners who petition for habeas corpus relief to present their federal claims not only to their states' courts but specifically to their states' highest courts in order properly to exhaust those claims. *O'Sullivan*, 526 U.S. at 845. *O'Sullivan's* requirement is not discretionary, even in states whose highest courts have discretionary control over their dockets. *Id.* at 845-848. In *O'Sullivan*, Boerckel, the petitioner below, had failed to present three of the six issues in his federal habeas petition to the Illinois Supreme Court. This Court, overruling the Seventh Circuit, held the District Court had correctly deemed those three issues procedurally defaulted. *Id.* at 841-842, 848.

The state is incorrect when it depicts a Ninth Circuit that applies a "whole record review" test, because the Ninth Circuit's application of *O'Sullivan* is every bit as strict as is its application of Duncan. In *Gatlin*, the Ninth Circuit held the petitioner's due process claim to be procedurally defaulted merely because Gatlin filed a legally insufficient petition for review with the California Supreme Court. 189 F.3d at 888. That is not whole record review. Similarly, the court upheld the state's claim of procedural default in *Hiivala* based on the contents of Hiivala's argument to the Washington Supreme Court. 195 F.3d at 1107; *see also Shumway*, 223 F.3d at 988.

Perhaps the state is confusing "whole record review" with the fact that the Ninth Circuit will not find the fair presentation requirement has been met unless the federal issue is not only presented to the Oregon Supreme Court but also meets Or. R. App. P. 9.20(2)'s requirement to first raise the issue in the Oregon Court of Appeals. Supp.

App. at 34. Thus, Oregon cases get no special treatment from the Ninth Circuit when it comes to the *O'Sullivan* test, because Oregon petitioners must meet the additional requirement of Or. R. App. P. 9.20(2). *See also, Peterson*, 319 F.3d at 1154 (concluding that "Peterson did not fairly present his federal claim to the Oregon Supreme Court because, on the face of his petition for review in that court, he expressly limited his claim to Oregon constitutional law"). The requirements of *O'Sullivan* are safe in the Ninth Circuit.

C. *In Mr. Reese's Case, the Ninth Circuit Strictly Adhered to the Requirements of Duncan and O'Sullivan.*

Consistently with this Court's fair presentation principles, the Ninth Circuit recognizes that Oregon's state appellate rules increase the number of means by which post-conviction petitioners may properly present federal claims to the Oregon Supreme Court. The Ninth Circuit's decision in Mr. Reese's case exemplifies the way in which the Ninth Circuit balances this recognition with its adherence to this Court's standards for fair presentation as explained in *Duncan* and *O'Sullivan*. In Mr. Reese's case, the Ninth Circuit explained that, under those cases, "the issue becomes whether Reese alerted the Oregon Supreme Court to the federal nature of his claim of ineffective assistance of appellate counsel. Because of Oregon's rules of appellate procedure, to resolve this issue we must address two distinct questions: (1) Was the federal nature of Reese's claim

properly raised to the Oregon Court of Appeals; and (2) Did Reese also comply with *Lyons* [which is to say, with *O'Sullivan*] at the Oregon Supreme Court." App. A at 13.

The Ninth Circuit complied with *Duncan* and *O'Sullivan* by ascertaining that Mr. Reese had alerted all three levels of the Oregon court system, including Oregon's highest court, of the fact he was raising his ineffective assistance of appellate counsel claim under the Sixth and Fourteenth Amendments. The Ninth Circuit noted that Mr. Reese had cited federal authority in his amended PCR petition and that the PCR trial court had, in turn, relied exclusively on federal law in denying his claim. App. A at 14. The Ninth Circuit continued by explaining that

> under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66.

Reese, App. A at 15.

Finally, the Ninth Circuit ascertained that its reversal of the District Court would in no way offend the rule of *O'Sullivan* nor its own decision in *Lyons*. This was the case because, in the Ninth Circuit's words,

> the PCR court decided the claim on the basis of federal law; Oregon's procedural rules put the reviewing courts on notice that the PCR court decision was required to state clearly its ground for decision; any review of the PCR court decision would have disclosed its federal law basis; and the Oregon Court of Appeals issued only a summary affirmance of the

> PCR court's decision. Under these circumstances, it must be presumed that, before deciding to deny discretionary review, the Oregon Supreme Court reviewed the PCR court decision that should have alerted the court to the federal nature of Reese's claim.
>
> The Oregon Supreme Court was thus on notice of the specifically federal nature of Reese's claim of ineffective assistance of appellate counsel.

App. A at 19. Compliance with *Duncan* and *O'Sullivan* was a concern of the first order for the Ninth Circuit in deciding Mr. Reese's case.

D. Since Reese, the En Banc Ninth Circuit Has Reaffirmed Its Strict Adherence to Both Duncan and O'Sullivan.

Just this February, the Ninth Circuit, sitting en banc, again made its strict enforcement of *Duncan* and *O'Sullivan* explicit in *Peterson v. Lampert*. In *Peterson*, the District Court held that Peterson, an Oregon prisoner, failed to exhaust his ineffective assistance of counsel claim by expressly limiting his petition for review in the Oregon Supreme Court to a claim that his rights under the Oregon Constitution were violated. *Peterson v. Lampert*, 2000 WL 1268840 (D. Or. Sep. 5, 2000). Peterson appealed to the Ninth Circuit, which affirmed the District Court's decision, 277 F.3d 1073 (2002), and then reaffirmed it en banc, 319 F.3d 1153.

Peterson argued, *inter alia*, that he had fairly presented his federal ineffective assistance claim to the Oregon Supreme Court. He contended this was so because he had presented that claim to the Oregon Court of Appeals, and because Oregon Rule of

Appellate Procedure 9.20(2) states that if the Supreme Court does not limit its consideration to a specific question or questions,

> the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

Or. R. App. P. 9.20; *see Peterson*, 319 F.3d at 1156-1157.

The Ninth Circuit disagreed. It explained that Peterson's petition for review by the Oregon Supreme Court "did not refer to his appellate court brief, did not mention any provision of the Federal Constitution, and did not mention 'ineffective' assistance of counsel." Hence Oregon Rule 9.20 was of no aid to Peterson. *Id.* at 1157. The Ninth Circuit took pains to distinguish Mr. Reese's case, which had recently been before it. It explained that in Mr. Reese's case, Rule 9.20 had quite a different effect, because there "the petition for review explicitly mentioned the federal Sixth and Fourteenth Amendments, and the only opinion below had explicitly decided the ineffective assistance of appellate counsel claim." *Id.*

Since Peterson had not done what Mr. Reese did, the Ninth Circuit explained that the federal courts were closed to him. The Ninth Circuit squarely rested its denial of the writ to Peterson upon the authority of *Duncan* and *O'Sullivan*. *Id.* at 1155-1156, 1161. Its record of compliance with those decisions remains unbroken.

III. THE NINTH CIRCUIT'S STRICT ADHERENCE TO THE FAIR PRESENTATION REQUIREMENTS OF *DUNCAN* AND *O'SULLIVAN* RUNS COUNTER TO GRANTING CERTIORARI REVIEW TO CORRECT ANY CONFLICT AMONG THE CIRCUITS.

Any conflict among the circuits should be settled in a case where the circuit court of appeals does not adhere to the fair presentation requirements of *Duncan* and *O'Sullivan*. This is not that case.

A. *Although the Ninth Circuit Strictly Adheres to the Requirements of Duncan and O'Sullivan, Some Other Circuits Do Not.*

The state is correct when it says that some circuits do not follow *Duncan* and *O'Sullivan* as strictly as others do. The state is incorrect about the relative position of the Ninth Circuit among these circuits, however. The Ninth Circuit is one of the *strictest* circuits, from the standpoint of a petitioner, in this area of the law. *See Peterson*, 319 F.3d 1153; *Lyons*, 232 F.3d 666. It shares pride of place on that ground with the Fourth and Eleventh Circuits. *See Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000); *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002).

The state accurately describes the tests used by the Fourth and Eleventh Circuits. These circuits, like the Ninth, apply a "strict presentation" test. The Fourth Circuit, e.g., explains that

> [f]air presentation mandates that the federal claim "be presented face-up and squarely.... Oblique references which hint that a theory may be lurking in the woodwork will not suffice." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (internal quotation marks omitted). Rather, "both the operative facts and the controlling legal principles must be presented

> to the state court." *Id.* (internal quotation marks omitted). Importantly, the presentation to the state court of a state law claim that is similar to a federal claim does not exhaust the federal claim. *See Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam).

Baker, 220 F.3d at 289; accord, *Isaacs*, 300 F.3d at 1254.

Where the state goes amiss is in its attempt to distinguish the Ninth Circuit's approach. The Ninth Circuit knows every bit as well as the Fourth Circuit how to deal a petitioner's hopes a blow by application of the *Duncan* standard. *Compare Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) (delineating the *Duncan* standard by stating that "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court") *with Baker*, 220 F.3d at 289 ("the presentation to the state court of a state law claim that is similar to a federal claim does not exhaust the federal claim"). The Ninth Circuit's application of *O'Sullivan* is every bit as strict as is its application of *Duncan*. *See Gatlin*, 189 F.3d at 888; *Hiivala*, 195 F.3d at 1107; *Shumway*, 223 F.3d at 988; *Peterson*, 319 F.3d at 1154.

The Ninth Circuit, in sum, does not apply a "whole record review" test, not even in Oregon cases. Only the First and Fifth Circuits apply that sort of test. *See Barresi v. Maloney*, 296 F.3d 48, 52 (1st Cir. 2002); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (per curiam).

The state's description of the "substance of a claim" test applied by the Second, Third, Seventh, and Eighth Circuits accurately reflects the test that is regularly employed by those circuits. *See Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc); *Ramirez v. Attorney General*, 280 F.3d 87, 90, 94-95 (2d Cir. 2001); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Odem v. Hopkins*, 192 F.3d 772 (8th Cir. 1999).

Finally, though the state perplexingly fails to discuss their tests, the remaining circuits are also basically "substance of a claim" circuits. *See Carter v. Bell*, 218 F.3d 581, 606-607 (6th Cir. 2000); *McMeans v. Brigano*, 228 F.3d 674, 681-682 (6th Cir. 2000); *Nichols v. Sullivan*, 867 F.2d 1250, 1252-1253 (10th Cir. 1989); *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997); *Thomas v. Gibson*, 218 F.3d 1213, 1221 n. 6 (10th Cir. 2000). These circuits, for instance, reach a different conclusion than did the Ninth Circuit in *Peterson* on the question of the propriety of citing state-court decisions applying or embodying federal constitutional principles as a method of fair presentation. These circuits allow such citation when a strict-presentation circuit such as the Ninth Circuit would forbid it. *See e.g. McMeans*, 228 F.3d at 681-682.

A comparison of contemporaneous decisions from all the circuits shows that the Ninth Circuit, along with the Fourth and Eleventh Circuits, adheres more strictly —- not, as the state would have it, less strictly — to this Court's fair-presentation cases than do all of the other circuit courts of appeals.

B. If the Court Believes the Conflict Between the Circuits Is Sufficient to Require Correction, It Should Deny the State's Petition in this Case and Consider Granting a Petition in a Case from One of the Circuits That Does Not Strictly Adhere to the Requirements of Duncan and O'Sullivan.

The crux of the amicus brief is that this Court should strictly interpret *Duncan* and *O'Sullivan*. Amicus Brief at 3. However, the amici fail to recognize that the Ninth Circuit strictly interpreted *Duncan* and *O'Sullivan* in Mr. Reese's case, as it has in all other exhaustion cases since this Court's decision in *Duncan*. Therefore, if the amici wish this Court to strictly interpret *Duncan* and *O'Sullivan* in all the circuits, they should file another amicus brief in a case where one of those circuits fails to adhere to the dictates of *Duncan* and *O'Sullivan*.

IV. THERE ARE OTHER LEGAL GROUNDS FOR AFFIRMANCE THAT DEMONSTRATE THE DECISION BELOW IS CORRECT REGARDLESS OF HOW THE COURT RESOLVES THE QUESTION PRESENTED.

In Oregon, appellate counsel may file a *Balfour* brief for an appeal that counsel considers to be without merit. Although both the Magistrate Judge and the District Court Judge found the *Balfour* procedure to be unconstitutional, the court below indicated "we do not have the occasion to rule on the constitutionality of the *Balfour* system." App. A at 8 n. 6.

It was unnecessary for the court below to decide *Balfour*'s constitutionality, because that court ruled that Mr. Reese fairly presented his federal ineffective assistance of counsel claim to the Oregon courts. Should this Court re-open the question of

exhaustion, it will be required to re-open the question of *Balfour*'s constitutionality, because the unconstitutionality of *Balfour*, recognized by both the Magistrate Judge and the District Court Judge, also is the foundation for Mr. Reese's alternative arguments, all of which were articulated in his appeal but were not ruled upon by the court below. That is, the Court will be required to not only decide the constitutionality of the *Balfour* system, but it will be required, in turn, to decide or to remand for a decision on whether: (1) the *Balfour* procedure rendered Oregon's post-conviction process ineffective to protect the rights of Mr. Reese, thereby excusing exhaustion altogether; (2) the *Balfour* system constitutes an adequate state ground to support a procedural default in this case; and (3) there is cause and prejudice in Mr. Reese's case.

The dissenting opinion below recognizes Mr. Reese did not receive a fair shake:

> By dissenting, I do not mean to diminish the disturbing history of this case. The parade of lawyers assigned to Reese and the mistakes made in his representation are an embarrassment.

App. A at 23. However, the dissent fails to mention that the embarrassment stemmed from Oregon's unconstitutional *Balfour* system -- a system which permitted Mr. Reese's direct appeal counsel to refuse to argue issues on his behalf, and which, in turn, allowed PCR appellate counsel to do the same -- in both instances without requiring an *Anders*-type brief by counsel or independent review of the record by the Court of Appeals.[6]

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[6]Mr. Reese was resentenced without counsel and without waiving his right to counsel under *Faretta v. California*, 422 U.S. 866 (1975). His direct appeal counsel did not raise the waiver issue but instead filed a *Balfour* brief. His post-conviction appeal

V. THE QUESTION PRESENTED WAS NEVER RAISED IN THE DISTRICT COURT AND WAS, THEREFORE, WAIVED BY THE STATE.

In her Amended Findings and Recommendation, the Magistrate Judge specifically found that Mr. Reese had presented his federal constitutional issue in his petition for review to the Oregon Supreme Court. Supp. App. at 34. The state objected to the Magistrate Judge's Amended Findings and Recommendation, but it did not contest her specific finding that Mr. Reese had presented his federal constitutional issue to the Oregon Supreme Court in his petition for review. Rather, as it had argued throughout the course of the district court litigation, the state vigorously argued that Mr. Reese's ineffective assistance claim had not been fairly presented to the intermediate appellate court, the Oregon Court of Appeals. *See* State's Objections at 3-5, attached as Appendix 2. By failing to raise a procedural default defense in the district court regarding the petition for review to the Oregon Supreme Court, the state waived it.[7]

The state waives its procedural default defense when it fails to raise it in the district court. See generally Randy Hertz & James S. Liebman, 2 Federal Habeas Corpus Practice & Procedure 4th § 26.2a, at 1142-1148 & nn. 1-6, Supp. at 109-110 (2001 & Supp. 2002) (collecting cases).

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counsel turned in a similarly slipshod performance, filing another *Balfour* brief rather than arguing that direct appeal counsel was ineffective for failing to raise the issue.

[7]Mr. Reese presented this waiver argument in the court below, but the court did not address it.

In *Trest v. Cain*, this Court observed that:

> procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.' *Gray v. Netherland*, 518 U.S. 152, 166, 116 S. Ct. 2074, 2082, 135 L.Ed.2d 457 (1996); *see Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1, 100 S. Ct. 2124, 2127, n. 1, 65 L.Ed.2d 86 (1980).

522 U.S. 87, 89 (1997). The Court made the same point, albeit in dicta, nearly two decades earlier:

> In some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim. E.g., *Estelle v. Smith*, 451 U.S. 454, 468, n. 12, 101 S. Ct. 1866, 1876 n. 12, 68 L.Ed.2d 359 (1981); *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1, 100 S. Ct. 2124, 2127 n. 1, 65 L.Ed.2d 86 (1980).

Engle v. Isaac, 456 U.S. 107, 124 n. 26 (1982). *See also Lee v. Kemna*, 534 U.S. 362, 376 n. 8 (2002) (different procedural posture).

Because the state never argued in the district court that a procedural default occurred based on Mr. Reese's purported failure to properly present the appellate ineffective assistance claim in his petition for review to the Oregon Supreme Court, it waived the defense.

VI. THE COURT BELOW HONORED THE PRINCIPLES OF COMITY AND FEDERALISM IN CORRECTLY DECIDING THIS CASE ON THE MERITS.

Mr. Reese agrees with the state that "judges are not like pigs hunting for truffles buried in briefs." Petition at 27 (quoting dissenting opinion below, App. A at 20). In Mr. Reese's case, however, no hunting was required.

The PCR trial court's memorandum opinion did what Or. Rev. Stat. §138.640 requires: it specified the federal constitutional basis of the court's ruling. The PCR court's opinion then became the court's judgment, again pursuant to Or. Rev. Stat. §138.640. The constitutional determination was then "examine[d] anew" by the Oregon Court of Appeals. *Davis*, 151 Or. App. at 70, 948 P.2d at 329. Pursuant to Or. Rev. Stat. §138.660, the appellate court's summary affirmance of the judgment constituted a ruling on the merits of the federal ineffective assistance claim. Finally, in his petition for review to the Oregon Supreme Court, Mr. Reese sought further review of his claim of ineffective assistance of appellate counsel, a claim presented and decided as a federal constitutional claim.

The exhaustion principle ensures that state courts have the first opportunity to correct their own constitutional errors. The court below honored this principle, stating:

> The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the state "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis in internal quotations omitted).

App. A at 18. Oregon had a fair opportunity to decide the federal claim. If the Oregon Supreme Court had granted review, the only ineffective assistance of appellate counsel claim it could have decided was the federal claim decided by the PCR court and affirmed on the merits by the Oregon Court of Appeals.

Comity was served here. Mr. Reese gave the state courts a fair opportunity to pass upon and correct his federal constitutional claim, and the Oregon courts forewent their opportunity. Oregon had the first opportunity to hear Mr. Reese's federal habeas claim. The court below, showing respect to comity and federalism, agreed. Quoting *Duncan*, 513 U.S. at 365, for the proposition that "[t]o satisfy the exhaustion requirement of §2254, habeas petitioners must 'fairly presen[t] federal claims to the state courts to give the state the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights," it held that Oregon had such an opportunity, thereby satisfying comity's chief concern:

> Comity requires only that we not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity the state foregoes.

App. A at 18 (emphasis by the court).

Oregon's plea for a uniform fair presentation rule runs counter to comity. It fails to afford full respect for every state's decision about how to structure its own rules of pleading and decision. It also constructs a trap for unwary PCR petitioners, who could plead facts and law sufficient to raise their federal claims in the view of the state courts, only later to find that the federal courts think that the state courts were not given an adequate opportunity.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 21st day of April, 2003.

Dennis N. Balske
Attorney for Respondent

No. 02-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 200__

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

CERTIFICATE OF SERVICE AND MAILING

I, Dennis N. Balske, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION on the counsel for the petitioner by depositing in the United States Post Office, in Portland, Oregon on April 18, 2003, first class postage prepaid, a true, exact and full copy thereof addressed to:

AAG Robert Rocklin &
Mary H. Williams
240 Justice Building
Salem, OR 97310

Walter Dellinger
Acting Solicitor General
Department of Justice,#5614
10th & Constitution, N.W.
Washington, D.C. 20530

Stephen R. Carter
Attorney General of Indiana
Gary Damon Secrest
Deputy Attorney General
Office of the Attorney General
Indiana Government Center South, Fifth Floor
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Indianapolis, IN 46204-2770

and by email to AAG Robert Rocklin at bob.rocklin@state.or.us.

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on April 18, 2003, with first-class postage prepaid.

Dennis N. Balske
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this April 18, 2003.

OFFICIAL SEAL
J LILLIE-CANNON
NOTARY PUBLIC-OREGON
COMMISSION NO. 344198
MY COMMISSION EXPIRES MARCH 22 2005

Notary Public of Oregon